publicly confirmed the existence of such an investigation, because there is little or no privacy interest in such public-record information.[25] However, in Reporters Committee, the Supreme Court found that substantial privacy interests can exist in personal information such as is contained in "rap sheets," even though the information has been made available to the general public at some place and point in time. Applying a "practical obscurity" standard,[26] the Court observed that if such items of information actually "were `freely available,' there would be no reason to invoke the FOIA to obtain access to [them]."[27]

All courts of appeals to have addressed the issue have found protectible privacy interests--in conjunction with or in lieu of protection under Exemption 7(D)--in the identities of individuals who provide information to law enforcement agencies.[28] Consequently, the names of witnesses, their home and busi

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[25] See, e.g., Rizzo v. United States Dep't of Justice, No. 84-2080, slip op. at 5-6 (D.D.C. Feb. 28, 1985) (facts elicited at public trial are matters of public knowledge); Tennessean Newspapers, Inc. v. Levi, 403 F. Supp. 1318, 1320-21 (M.D. Tenn. 1975) (identities of individuals recently arrested or indicted ordered disclosed); see also Akron Standard Div. of Eagle-Picher Indus. v. Donovan, 780 F.2d 568, 572 (6th Cir. 1986) (information relating to job performance that "had been fully explored in public proceedings" not exempt); Myers v. United States Dep't of Justice, No. 85-1746, slip op. at 5 (D.D.C. Sept. 22, 1986) (matters discussed in trial testimony of law enforcement officials not exempt). (See Exemption 7(D), below, for a discussion of the status of open-court testimony under that exemption.) But see Kimberlin v. Department of the Treasury, 774 F.2d 204, 209 (7th Cir. 1985) (Exemption 7(C) held applicable to third party's driver's license and passport "which were introduced into evidence" in federal criminal trial).

[26] 489 U.S. at 762-63, 780.

[27] Id. at 764.

[28] See, e.g., Beard v. Espy, No. 94-16748, 1995 U.S. App. LEXIS 38269, at *2 (9th Cir. Dec. 11, 1995) (protecting complaint letter); Manna, 51 F.3d at 1166 (interviewees and witnesses involved in criminal investigation have substantial privacy interest in nondisclosure of their names, particularly when requester held high position in La Cosa Nostra); McDonnell, 4 F.3d at 1256 (protecting identities of witnesses and third parties involved in criminal investigation of maritime disaster); Massey, 3 F.3d at 624 (disclosure of names of cooperating witnesses and third parties, including cooperating law enforcement officials, could subject them to "embarrassment and harassment"); KTVY-TV v. United States, 919 F.2d 1465, 1469 (10th Cir. 1990) (per curiam) (withholding interviewees' names as "necessary to avoid harassment and embarrassment"); Cleary v. FBI, 811 F.2d 421, 424 (8th Cir. 1987) (disclosure would subject "sources to unnecessary questioning concerning the investigation [and] to subpoenas issued by private litigants in civil suits incidentally related to the investigation"); Cuccaro v. Secretary of Labor, 770 F.2d 355, 359 (3d Cir. 1985) ("privacy interest of . . . witnesses who participated in OSHA's investigation

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ness addresses, and their telephone numbers have been held properly protectible under Exemption 7(C).[29] Additionally, Exemption 7(C) protection has been

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[28](...continued)
outweighs public interest in disclosure"); L&C Marine Transp., Ltd. v. United States, 740 F.2d 919, 923 (11th Cir. 1984) (disclosure of identities of employee-witnesses in OSHA investigation could cause "problems at their jobs and with their livelihoods"); New England Apple, 725 F.2d at 144-45 ("Disclosure could have a significant, adverse effect on this individual's private or professional life."); Kiraly v. FBI, 728 F.2d 273, 278-80 (6th Cir. 1984); Holy Spirit Ass'n v. FBI, 683 F.2d 562, 564-65 (D.C. Cir. 1982) (concurring opinion) ("risk of harassment" and fear of reprisals); Alirez v. NLRB, 676 F.2d 423, 427 (10th Cir. 1982) (disclosure would result in "embarrassment or reprisals"); Lesar, 636 F.2d at 488 ("`Those cooperating with law enforcement should not now pay the price of full disclosure of personal details.'" (quoting Lesar, 455 F. Supp. at 925)); Scherer v. Kelley, 584 F.2d 170, 176 (7th Cir. 1978) (need to protect informants' identities "cannot be questioned"); Maroscia, 569 F.2d at 1002 (deletion of references to third parties who provided information "to minimize the public exposure or possible harassment").

[29] See Computer Prof'ls, 72 F.3d at 904 (protecting names of witnesses); Manna, 51 F.3d at 1166 (witnesses in La Cosa Nostra case have "substantial" privacy interest in nondisclosure of their names); L&C Marine, 740 F.2d at 922 ("employee-witnesses . . . have a substantial privacy interest"); Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) ("[The requester] has mentioned no legitimate need for the witnesses' phone numbers and we can well imagine the invasions of privacy that would result should he obtain them."); Foster v. United States Dep't of Justice, 933 F. Supp. 687, 692 (E.D. Mich. 1996) (protecting prospective witnesses); Crooker v. Tax Div. of the United States Dep't of Justice, No. 94-30129, 1995 WL 783236, at *18 (D. Mass. Nov. 17, 1995) (magistrate's recommendation) (holding names of witnesses and individuals who cooperated with government protected to prevent "undue embarrassment and harassment"), adopted (D. Mass. Dec. 15, 1995), aff'd per curiam, 94 F.3d 640 (1st Cir. 1996) (unpublished table decision); Cappabianca v. Commissioner, United States Customs Serv., 847 F. Supp. 1558, 1566 (M.D. Fla. 1994) (witnesses, investigators, and other subjects of investigation have "substantial privacy interests"); Taylor v. Office of Special Counsel, No. 91-N-734, slip op. at 10 (D. Colo. Mar. 22, 1993) (release of documents would subject witnesses to a reasonable likelihood of harassment and embarrassment); Brittany Dyeing & Printing Corp. v. EPA, No. 91-2711, slip op. at 3-4 (D.D.C. Mar. 12, 1993) (identities of witnesses who assisted in preparation of environmental report protectible); Farese v. United States Dep't of Justice, 683 F. Supp. 273, 275 (D.D.C. 1987) (names and number of family members of participants in Witness Security Program, as well as funds authorized to each, held exempt because disclosure "would pose a possible danger to the persons named" or "might subject those persons to harassment"); see also Harper v. United States Dep't of Justice, No. 86-5489, slip op. at 3 (D.C. Cir. Sept. 22, 1987) (names of potential witnesses held exempt); Kilroy v. NLRB, 633 F. Supp. 136, 145 (S.D. Ohio 1985) (names and telephone numbers of persons who provided affidavits held exempt), aff'd, 823 F.2d 553 (6th Cir. 1987)
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afforded to the identities of informants,[30] even when it was shown that "the information provided to law enforcement authorities was knowingly false."[31]

Although on occasion a pre-Reporters Committee decision found that an

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[29](...continued)
(unpublished table
decision); cf. Brown v. FBI, 658 F.2d 71, 75-76 (2d Cir. 1981) (information concerning witness who testified against requester protected under Exemption 6); Fritz v. IRS, 862 F. Supp. 234, 236 (W.D. Wis. 1994) (name and address of person who purchased requester's seized car held exempt). But see Ferri v. Bell, 645 F.2d 1213, 1218 (3d Cir. 1981) (public interest in "Brady material" concerning possible "deal" between witness and prosecution outweighs witness' privacy interests).

[30] See Quiñon, 86 F.3d at 1227, 1231 (protecting informants' identities in absence of agency misconduct); Schiffer, 78 F.3d at 1410 (protecting names of persons who provided information to FBI); Computer Prof'ls, 72 F.3d at 904-05 (protecting names of informants, including name of company that reported crime to police, because disclosure might permit identification of corporate officer who reported crime); Beard, 1995 U.S. App. LEXIS 38269, at *2 (protecting complaint letter); Manna, 51 F.3d at 1162 (names of informants in La Cosa Nostra case safeguarded); Jones, 41 F.3d at 246 (informants' identities protected); McCutchen v. HHS, 30 F.3d 183, 189 (D.C. Cir. 1994) (names of individuals alleging scientific misconduct protected); Koch v. United States Postal Serv., No. 93-1487, slip op. at 2 (8th Cir. Oct. 8, 1993) ("The informant's interest in maintaining confidentiality is considerable [because] the informant risked embarrassment, harassment, and emotional and physical retaliation."); Nadler v. United States Dep't of Justice, 955 F.2d 1479, 1490 (11th Cir. 1992) ("Disclosure of the identities of the FBI's sources will disclose a great deal about those sources but in this case will disclose virtually nothing about the conduct of the government."); Campbell v. United States Dep't of Justice, No. 89-CV-3016, 1996 WL 554511, at **8-9 (D.D.C. Sept. 19, 1996) (protecting identities of individuals who provided leads to FBI); Tanks, 1996 U.S. Dist. LEXIS 7266, at **12-13 (holding criminal histories and other personal information about informants exempt; release could inflict "great harm"); Epps v. United States Dep't of Justice, 801 F. Supp. 787, 793 (D.D.C. 1992) (identities of third parties who provided information to agency properly withheld), summary affirmance granted in pertinent part, vacated & remanded in part, No. 92-5360 (D.C. Cir. Apr. 29, 1993); Johnson v. United States Dep't of Justice, No. 85-714, slip op. at 3 (D.D.C. Nov. 13, 1991) (requester's interest in overturning his conviction does not outweigh substantial privacy interests of informants); see also Wrenn v. Vanderbilt Univ. Hosp., No. 3:91-1005, slip op. at 14-15 (M.D. Tenn. June 10, 1993) (identity of person charging discrimination protectible), aff'd, 16 F.3d 1224 (6th Cir. 1994) (unpublished table decision).

[31] Gabrielli v. United States Dep't of Justice, 594 F. Supp. 309, 313 (N.D.N.Y. 1984); see also Block v. FBI, No. 83-813, slip op. at 11 (D.D.C. Nov. 19, 1984) ("[The requester's] personal interest in knowing who wrote letters concerning him . . . is not sufficient to demonstrate a public interest.") (Exemption 6).

individual's testimony at trial precluded Exemption 7(C) protection,[32] under the Reporters Committee "practical obscurity" standard, trial testimony should not ordinarily diminish Exemption 7(C) protection.[33] Plainly, if a person who actually testifies retains a substantial privacy interest, the privacy of someone who is identified only as a potential witness likewise should be preserved.[34]

Moreover, courts have repeatedly recognized that the passage of time will not ordinarily diminish the applicability of Exemption 7(C).[35] This may be es

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[32] Compare Myers, No. 85-1746, slip op. at 3-6 (D.D.C. Sept. 22, 1986) ("no privacy interest exists" as to names of law enforcement personnel who testified at requester's trial), with Prows v. United States Dep't of Justice, No. 87-1657, slip op. at 6 (D.D.C. Apr. 13, 1989) ("[T]he protection of Exemption 7(C) is not waived by the act of testifying at trial."), summary affirmance granted, No. 89-5185 (D.C. Cir. Feb. 26, 1990).

[33] See Jones, 41 F.3d at 247 (fact that law enforcement employee chose to testify or was required to testify or otherwise come forward in other settings does not amount to waiver of personal privacy); Burge v. Eastburn, 934 F.2d 577, 579 (5th Cir. 1991) (affirming refusal, under Exemption 7(C), to confirm or deny existence of information in FBI files regarding individuals who testified at plaintiff's murder trial); Tanks, 1996 U.S. Dist. LEXIS 7266, at *10 (holding that requester's knowledge of identities of informants who testified against him does not diminish their privacy interests); Engelking v. DEA, No. 91-0165, slip op. at 7-8 (D.D.C. Nov. 30, 1992) (even though information sought is available in requester's trial transcript, Exemption 7(C) protects information about people who were implicated, involved, or were associated with requester), summary affirmance granted in pertinent part, vacated & remanded in part, No. 93-5091 (D.C. Cir. Oct. 6, 1993); Curro v. United States Dep't of Justice, No. 90-1887, slip op. at 5 (D.D.C. Mar. 20, 1991) ("[W]itness[es] who testify at criminal trial do not forfeit their privacy interests, except, perhaps, as to the public testimony."); see also Pittman v. Phillips, No. 91-3146, slip op. at 2-4 (D.D.C. Oct. 8, 1992) (protecting names of law enforcement officers in audiotape recordings made of requester's plea-bargain negotiations with government). But see Linn v. United States Dep't of Justice, No. 92-1406, 1997 U.S. Dist. LEXIS 9321, at *17 (D.D.C. May 29, 1997) (finding no justification for withholding identities of witnesses who testified against requester at trial) (Exemptions 7(C) and 7(F)), appeal voluntarily dismissed, No. 97-5122 (D.C. Cir. July 14, 1997).

[34] See Watson v. United States Dep't of Justice, 799 F. Supp. 193, 196 (D.D.C. 1992) (identities of potential witnesses protectible); Harvey v. United States Dep't of Justice, 747 F. Supp. 29, 37 (D.D.C. 1990).

[35] See, e.g., McDonnell, 4 F.3d at 1256 (passage of 49 years does not negate individual's privacy interest); Maynard, 986 F.2d at 566 n.21 (effect of passage of time upon individual's privacy interests found "simply irrelevant"); Fitzgibbon, 911 F.2d at 768 (passage of more than 30 years irrelevant when records reveal nothing about government activities); Keys, 830 F.2d at 348 (passage of 40 years did not "dilute the privacy interest as to tip the balance the

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pecially true in instances in which the information was obtained through questionable law enforcement investigations.[36] In fact, the "practical obscurity" concept expressly recognizes that the passage of time may actually increase the privacy interest at stake when disclosure would revive information that was once public knowledge but has long since faded from memory.[37]

An individual's Exemption 7(C) privacy interest is not extinguished merely

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[35](...continued)
other way"); King, 830 F.2d at 234 (rejecting argument that passage of time diminished privacy interests at stake in records more than 35 years old); Diamond v. FBI, 707 F.2d 75, 77 (2d Cir. 1983) ("the danger of disclosure may apply to old documents"); Simon, 752 F. Supp. at 20 (The "passage of almost forty years does not so abate the privacy interests at stake in a controversial case of this kind."); Stone, 727 F. Supp. at 664 (FBI agents who participated in investigation over 20 years ago, even one as well known as RFK assassination, "have earned the right to be `left alone' unless an important public interest outweighs that right."); see also Exner, 902 F. Supp. at 244 n.7 (fact that incidents in question "occurred more than thirty years ago may, but does not necessarily, diminish the privacy interest somewhat"); Branch, 658 F. Supp. at 209 (The "privacy interests of the persons mentioned in the investigatory files do not necessarily diminish with the passage of time."); cf. Oglesby v. United States Dep't of the Army, 79 F.3d 1172, 1183 (D.C. Cir. 1996) (ruling that "mere passage of time is not a per se bar to reliance on exemption 1"). But see Davin, 60 F.3d at 1058 (for some individuals, privacy interest may become diluted by passage of over 60 years, though under certain circumstances potential for embarrassment and harassment may endure); Outlaw v. United States Dep't of the Army, 815 F. Supp. 505, 506 (D.D.C. Mar. 25, 1993) (agency must release 25-year-old photographs of murder victim with no known surviving next of kin; murder is "surely long forgotten by whatever public noticed it at the time"); Silets, 591 F. Supp. at 498 ("[W]here documents are exceptionally old, it is likely that their age has diminished the privacy interests at stake."); Wilkinson v. FBI, 633 F. Supp. 336, 345 (C.D. Cal. 1986) ("`There is likely to be little fear of retaliation, humiliation, or embarrassment over twenty years after the events.'" (quoting Powell v. United States Dep't of Justice, 584 F. Supp. 1508, 1526 (N.D. Cal. 1984))).

[36] See, e.g., Dunaway v. Webster, 519 F. Supp. 1059, 1079 (N.D. Cal. 1981) ("[The target of a McCarthy era investigation] may . . . deserve greater protection, because the connection to such an investigation might prove particularly embarrassing or damaging.").

[37] See Reporters Comm., 489 U.S. at 767 ("[O]ur cases have also recognized the privacy interest inherent in the nondisclosure of certain information even when the information may at one time have been public."); Rose v. Department of the Air Force, 495 F.2d 261, 267 (2d Cir. 1974) ("[A] person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information.") (Exemption 6), aff'd, 425 U.S. 352 (1976); see also Assassination Archives & Research Ctr. v. CIA, 903 F. Supp. 131, 133 (D.D.C. 1995) (finding that passage of 30 or 40 years "may actually increase privacy interests, and that even a modest privacy interest will suffice" to protect identities).

because a requester might on his own be able to "piece together" the identities of third parties whose names have been deleted.[38] Nor do persons mentioned in law enforcement records lose all their rights to privacy merely because their names have been disclosed.[39] Similarly, "[t]he fact that one document does disclose some names . . . does not mean that the privacy rights of these or others are waived; it has been held that [requesters] do not have the right to learn more

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[38] Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1491 (D.C. Cir. 1984); see also L&C Marine, 740 F.2d at 922 ("An individual does not lose his privacy interest under 7(C) because his identity . . . may be discovered through other means."); Master v. FBI, 926 F. Supp. 193, 198-99 (D.D.C. 1996) (protecting subjects of investigative interest even though plaintiffs allegedly know their names), summary affirmance granted, No. 96-5325, 1997 WL 369460 (D.C. Cir. June 2, 1997); Larson v. Executive Office for United States Attorneys, No. 85-2575, slip op. at 5 n.6 (D.D.C. Nov. 22, 1988) ("[T]he fact that [the requester] might know the names of some agents and witnesses who testified against him [as he alleges] does not justify release of documents that may or may not contain similar information.").

[39] See, e.g., Schiffer, 78 F.3d at 1410-11 (fact that much of information in requested documents was made public during related civil suit does not reduce privacy interest (citing Reporters Comm., 489 U.S. at 769)); Jones, 41 F.3d at 247 (fact that law enforcement employee chose to testify or was required to testify or otherwise come forward in other settings does not amount to waiver of personal privacy); Hunt, 972 F.2d at 288 ("public availability" of accused FBI agent's name does not defeat privacy protection and "would make redaction of [the agent's name in] the file a pointless exercise"); Fitzgibbon, 911 F.2d at 768 (fact that CIA or FBI may have released information about individual elsewhere does not diminish that individual's "substantial privacy interests"); Steinberg v. United States Dep't of Justice, No. 93-2409, slip op. at 11 (D.D.C. July 14, 1997) (allowing withholding of "non-public information" about third parties; "even widespread knowledge about a person's business dealings cannot serve to diminish his or her privacy interests in matters that are truly personal"); Thomas v. Office of United States Attorney, 928 F. Supp. 245, 250 n.8 (E.D.N.Y. 1996) (holding that despite public disclosure of some information about attorney's connection with crime family, he still retains privacy interests in preventing further disclosure); Crooker, 1995 WL 783236, at *18 (despite fact that requester may have learned identities of third parties through criminal discovery, Exemption 7(C) protection remains); Eagle Horse v. FBI, No. 92-2357, slip op. at 4 (D.D.C. July 28, 1995) (holding that although identities of individuals who took polygraph examination are already presumably known to requester from court records, their privacy interest in their files remains); Engelking, No. 91-0165, slip op. at 7-8 (D.D.C. Nov. 30, 1992) (even though information sought is available in requester's trial transcript, Exemption 7(C) protection remains). But see Detroit Free Press, 73 F.3d at 98 (finding no unwarranted invasion of privacy in disclosure of mug shots of indicted individuals who had already appeared in court and had their names divulged); cf. Grove v. CIA, 752 F. Supp. 28, 32 (D.D.C. 1990) (FBI must further explain Exemption 7(C) withholdings in light of highly publicized nature of investigation and fact that CIA and Secret Service released other records pertaining to same individuals).

about the activities and statements of persons merely because they are mentioned once in a public document about the investigation."[40]

Under the traditional Exemption 7(C) analysis, once a privacy interest has been identified and assessed, it is balanced against any public interest that would be served by disclosure.[41] And under Reporters Committee, the standard of public interest to consider is one specifically limited to the FOIA's "core purpose" of "shed[ding] light on an agency's performance of its statutory duties."[42] Accordingly, for example, the courts have consistently refused to recognize any public interest, as defined by Reporters Committee, in disclosure of information to assist a convict in challenging his conviction.[43] Indeed, a FOIA requester's

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[40] Kirk, 704 F. Supp. at 292.

[41] See Schiffer, 78 F.3d at 1410 (once agency shows that privacy interest exists, court must balance it against public's interest in disclosure); Computer Prof'ls, 72 F.3d at 904 (after privacy interest found, court must identify public interest to be served by disclosure); Massey, 3 F.3d at 624-25 (once agency establishes that privacy interest exists, that interest must be balanced against value of information in furthering FOIA's disclosure objectives); Church of Scientology, 995 F.2d at 921 (case remanded when district court failed to determine whether public interest in disclosure outweighed privacy concerns); Keys, 830 F.2d at 346; Thomas, 928 F. Supp. at 250 (since personal privacy interest in information is implicated, court must inquire whether any countervailing factors exist that would warrant invasion of that interest); Globe Newspaper Co. v. FBI, No. 91-13257, slip op. at 10 (D. Mass. Dec. 29, 1992) (public interest in disclosing amount of money government paid to officially confirmed informant guilty of criminal wrongdoing outweighs informant's de minimis privacy interest); Church of Scientology, 816 F. Supp. at 1160 (while employees have privacy interest in their handwriting, that interest does not outweigh public interest in disclosure of information contained in documents not otherwise exempt; agency must, at requester's expense, transcribe and disclose documents not otherwise exempt); see also FOIA Update, Spring 1989, at 7.

[42] 489 U.S. at 773.

[43] See, e.g., Hale, 973 F.2d at 901 (no FOIA-recognized public interest in death-row inmate's allegation of unfair trial); Landano v. United States Dep't of Justice, 956 F.2d 422, 430 (3d Cir.) (no public interest in disclosure of identities of individuals involved in murder investigation because such release would not shed light on how FBI fulfills its responsibilities), cert. denied on Exemption 7(C) grounds, 506 U.S. 868 (1992), rev'd & remanded on other grounds, 508 U.S. 165 (1993); Burge, 934 F.2d at 580 ("requester's need, however significant, does not warrant disclosure"); Thomas, 928 F. Supp. at 251 (holding that prisoner's personal interest in information to challenge his conviction "does not raise a FOIA-recognized interest that should be weighed against the subject's privacy interests"); Durham v. United States Postal Serv., No. 91-2234, slip op. at 4-5 (D.D.C. Nov. 25, 1992) ("Glomar" response appropriate even though plaintiff argues information would prove his innocence), summary affirmance granted, No. 92-5511 (D.C. Cir. July 27, 1993); Johnson v. United

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private need for information in connection with litigation plays no part in whether disclosure is warranted.[44] Unsubstantiated allegations of official misconduct have been held insufficient to establish a public interest in disclosure.[45] Further, it has

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[43](...continued)
States Dep't of Justice, 758 F. Supp. 2, 5 (D.D.C. 1991) ("Resort to Brady v. Maryland as grounds for waiving confidentiality [under Exemptions 7(C) and 7(D)] is . . . outside the proper role of the FOIA. Exceptions cannot be made because of the subject matter or [death-row status] of the requester.").

[44] See Massey, 3 F.3d at 625 ("[The] mere possibility that information may aid an individual in the pursuit of litigation does not give rise to a public interest."); Joslin v. United States Dep't of Labor, No. 88-1999, slip op. at 8 (10th Cir. Oct. 20, 1989) (no public interest in release of documents sought for use in private tort litigation); Exner, 902 F. Supp. at 244 & n.8 (requester's interest in pursuing legal remedies against person who entered her apartment does not pertain to workings of government; no public interest in release of person's name); Bruscino, No. 94-1955, slip op. at 20 (D.D.C. May 12, 1995) (no public interest in release of information concerning other inmates sought for use in private litigation); Andrews v. United States Dep't of Justice, 769 F. Supp. 314, 317 (E.D. Mo. 1991) (no public interest in satisfaction of private judgments); Wagner v. FBI, No. 90-1314, slip op. at 6-7 (D.D.C. June 4, 1991) ("purpose of the FOIA is not to support the needs or purposes of the individual requester"; public interest "is that of the public at large in investigating the actions of government agencies, not plaintiff's interest"), summary affirmance granted, No. 91-5220 (D.C. Cir. Aug. 3, 1992); Johnson v. Federal Bureau of Prisons, No. CV-90-H-645-E, slip op. at 8 (N.D. Ala. Nov. 1, 1990) (citing L&C Marine, 740 F.2d at 923). But see Sousa v. United States Dep't of Justice, Nos. 95-375, 95-410, 1996 U.S. Dist. LEXIS 18627, at *26 (D.D.C. Dec. 9, 1996) (recognizing that "[t]here certainly is at least some amount of public interest in overturning incorrect convictions," though finding that public interest to be insufficient to outweigh "significant" privacy interests of individuals mentioned); Butler, No. 86-2255, slip op. at 12-13 (D.D.C. Feb. 3, 1994) (identities of supervisory FBI personnel ordered disclosed because of "significant" public interest in protecting requester's due process rights in his attempt to vacate sentence); Outlaw, 815 F. Supp. at 506 (agency must release 25-year-old photographs of murder victim; "obvious public interest in the disclosure as a check on the administration of justice").

[45] See, e.g., Quiñon, 86 F.3d at 1231 (holding that "relevant question in determining whether there is public interest in disclosure is whether the FBI, not Chief Judge Tjoflat, has engaged in wrongdoing"; in absence of such evidence public interest is "insubstantial"); Schiffer, 78 F.3d at 1410 (finding "little to no" public interest in disclosure when requester made unsubstantiated claim that FBI's decision to investigate him had been affected by "undue influence"); Computer Prof'ls, 72 F.3d at 904-05 (finding no public interest in disclosure when requester suggests agency has engaged in illegal conduct but provides no evidence); McCutchen, 30 F.3d at 189 (finding that "negligible"
public interest in disclosure of identities of agency scientists who did not engage in scientific misconduct does not outweigh "substantial" privacy interests); Beck
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been held that no public interest exists in federal records that might reveal alleged misconduct by state officials;[46] such an attenuated interest "falls outside the ambit

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[45](...continued)
v. Department of Justice, 997 F.2d 1489, 1492-94 (D.C. Cir. 1993) (holding that agency properly "Glomarized" request for records concerning alleged wrongdoing by two named employees; no public interest absent any evidence of wrongdoing or widespread publicity of investigation); KTVY-TV, 919 F.2d at 1470 (allegations of "possible neglect"); Isley v. Executive Office for United States Attorneys, No. 96-0123, slip op. at 6-7 (D.D.C. Mar. 27, 1997) (holding that unsubstantiated allegations of prosecutorial misconduct are insufficient to outweigh privacy interests), appeal dismissed, No. 97-5105 (D.C. Cir. Sept. 8, 1997); Gomez v. United States Attorney, No. 93-2530, slip op. at 11 (D.D.C. Apr. 1, 1996) (ruling that "generalized accusations" of government misconduct are "wholly insufficient to outweigh privacy interests"), appeal voluntarily dismissed, No. 96-5185 (D.C. Cir. May 12, 1997); Exner, 902 F. Supp. at 244-45 & n.9 (allegation of FBI cover-up of "extremely sensitive political operation" provides "minimal at best" public interest); Triestman v. United States Dep't of Justice, 878 F. Supp. 667, 673 (S.D.N.Y. 1995) (no substantial public interest in disclosure when request seeks information concerning possible investigations of wrongdoing by named DEA agents); Buros, No. 93-571, slip op. at 10 (W.D. Wis. Oct. 26, 1994) (even though subject's potential mishandling of funds already known to public, "confirming . . . federal criminal investigation brushes the subject with an independent and indelible taint of wrongdoing"); Williams v. McCausland, No. 90-7563, slip op. at 28 (S.D.N.Y. Jan. 14, 1994) (protecting identities of government employees accused of improper conduct) (Exemptions 6 and 7(C)); Manchester, 823 F. Supp. at 1271 (sweeping allegations of governmental misconduct). But see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552, 567-69 (1st Cir. 1992) (aberrational finding of public interest in disclosure of unsubstantiated allegations against two senior officials); McLaughlin v. Sessions, No. 92-0454, slip op. at 15-16 (D.D.C. Sept. 22, 1993) (because request seeks information to determine whether FBI investigation was improperly terminated, requester's interest in scope and course of investigation constitutes recognized public interest which must be balanced against privacy interests of named individuals); cf. Dobronski v. FCC, 17 F.3d 275, 278 (9th Cir. 1994) (finding public interest in disclosure of sick leave records so that requester might be able to substantiate "tip" that agency official had improperly taken sick leave) (Exemption 6); Weiner, No. 83-1720, slip op. at 2, 7 (C.D. Cal. Dec. 6, 1995) (ordering disclosure of names and addresses of FBI agents involved in management and supervision of investigation of John Lennon; release would "provide meaningful way to open agency action to the light of public scrutiny" when it allegedly used unlawful activities) (applying FOIA in civil discovery context).

[46] See Landano, 956 F.2d at 430 (There is "no FOIA-recognized public interest in discovering wrongdoing by a state agency."); Thomas, 928 F. Supp. at 251 (recognizing that FOIA cannot serve as basis for requests about conduct of state agency).

of the public interest the FOIA was enacted to serve."[47]

It is important to remember that a requester must do more than identify a public interest that qualifies for consideration under Reporters Committee. He or she must demonstrate that the public interest in disclosure is sufficiently compelling to overcome legitimate privacy interests.[48] Of course, "[w]here the requester fails to assert a public interest purpose for disclosure, even a less than substantial invasion of another's privacy is unwarranted."[49] Moreover, it should be remembered that any special expertise claimed by the requester is irrelevant in assessing any public interest in disclosure.[50] In the wake of Re

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[47] Reporters Comm., 489 U.S. at 775; see also FOIA Update, Spring 1991, at 6 (explaining that "government activities" in Reporter's Comm. standard means activities of federal government).

[48] See Senate of P.R. v. United States Dep't of Justice, 823 F.2d 574, 588 (D.C. Cir. 1987) (general interest of legislature in "getting to the bottom" of highly controversial investigation held not sufficient to overcome "substantial privacy interests"); Ajluni, 947 F. Supp. at 605 ("In the absence of any strong countervailing public interest in disclosure, the privacy interests of the individuals who are the subjects of the redacted material must prevail."); McLeod v. Pena, No. 94-1924, slip op. at 5-6 (D.D.C. Feb. 9, 1996) (even if "highly speculative and weak" claims of public interest fall within Reporters Comm. guidelines, claims are by no means compelling and do not outweigh privacy interests), summary affirmance granted sub nom. McLeod v. United States Coast Guard, No. 96-5071, 1997 U.S. App. LEXIS 6000 (D.C. Cir. Feb. 10, 1997); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 59 (D.D.C. 1990) (public interest in alleged plot in United States by agents of now-deposed dictatorship held insufficient to overcome "strong privacy interests"); Stone, 727 F. Supp. at 667-68 n.4 ("[N]ew information considered significant by zealous students of the RFK assassination investigation would be nothing more than minutia of little or no value in terms of the public interest.").

[49] King v. United States Dep't of Justice, 586 F. Supp. 286, 294 (D.D.C. 1983), aff'd, 830 F.2d 210 (D.C. Cir. 1987); see also Beck, 997 F.2d at 1494 (when request implicates no public interest at all, court "`need not linger over the balance; something . . . outweighs nothing every time'" (quoting National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989)) (Exemptions 6 and 7(C)); Fitzgibbon, 911 F.2d at 768 (same); FOIA Update, Spring 1989, at 7.

[50] See Massey, 3 F.3d at 625 (The identity of the requesting party and the use that party plans to make of the requested information have "no bearing on the assessment of the public interest served by disclosure."); Stone, 727 F. Supp. at 668 n.4 (court looks to public interest served by release of information, "not to the highly specialized interests of those individuals who understandably have a greater personal stake in gaining access to that information"). But cf. Manna, 51 F.3d at 1166 (although court does not usually consider requester's identity, fact that requester held high position in La Cosa Nostra is certainly material to protec-

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porters Committee, the public interest standard will ordinarily not be satisfied when FOIA requesters seek law enforcement information pertaining to living individuals.[51]

In Reporters Committee, the Supreme Court emphasized the desirability of

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[50](...continued)
tion of individual privacy).

[51] See, e.g., Quiñon, 86 F.3d at 1231 (finding insufficient public interest in disclosing individuals mentioned in FBI files when no evidence of wrongdoing; even if individuals had engaged in wrongdoing, such misconduct would have to shed light on agency's action); Schiffer, 78 F.3d at 1410 (recognizing "little to no" public interest in disclosure of persons in FBI file, including some who provided information to FBI, when no evidence of FBI wrongdoing); Computer Prof'ls, 72 F.3d at 904-05 (finding no public interest in disclosure of informants, witnesses, and potential suspects when no evidence of agency illegal conduct); Schwarz v. Interpol, No. 94-4111, 1995 U.S. App. LEXIS 3987, at *7 (10th Cir. Feb. 28, 1995) (no public interest in disclosing whereabouts of requester's "alleged husband"); Maynard, 986 F.2d at 566 (no public interest in disclosure of information concerning low-level FBI employees and third parties); Fitzgibbon, 911 F.2d at 768 ("[T]here is no reasonably conceivable way in which the release of one individual's name . . . would allow citizens to know `what their government is up to.'" (quoting Reporters Comm., 489 U.S. at 1481)); McNamera, 1997 U.S. Dist. LEXIS 12059, at **34-39 (finding, where no evidence of agency wrongdoing, no public interest in disclosure of information concerning criminal investigations of private citizens); Stone, 727 F. Supp. at 666-67 (no public interest in disclosure of identities of low-level FBI agents who participated in RFK assassination investigation); Albuquerque Publ'g, 726 F. Supp. at 855-56 (no public interest in disclosure of information DEA obtained about individuals and their activities, when such material would not shed light on DEA's conduct with respect to its investigation); see also KTVY-TV, 919 F.2d at 1470 (disclosure of identities of witnesses and third parties would not further plaintiff's unsupported theory that post office shootings could have been prevented by postal authorities); Halloran v. VA, 874 F.2d 315, 323 (5th Cir. 1989) ("[M]erely stating that the interest exists in the abstract is not enough; rather, the court should have analyzed how that interest would be served by compelling disclosure."); FOIA Update, Spring 1989, at 6; cf. Nation Magazine, 71 F.3d at 895 ("in some, perhaps many," instances when third party seeks information on named individual in law enforcement files, public interest will be "negligible"; but when individual had publicly offered to help agency, disclosure of records concerning that fact might be in public interest by reflecting "agency activity" in how it responded to offers of assistance). But see Detroit Free Press, 73 F.3d at 98 (finding public interest in disclosure of mug shots of indicted individuals who had already appeared in court and had their names divulged; disclosure of photographs could reveal government's error in detaining wrong person and reveal circumstances surrounding arrest); Rosenfeld, 57 F.3d at 811-12 (exceptional finding of public interest in disclosure of names of subjects of investigatory interest; disclosure would serve public interest because it would shed light on FBI actions and show to what extent FBI investigated individuals for participating in political protests).

establishing "categorical balancing" under Exemption 7(C) as a means of achieving "workable rules" for processing FOIA requests.[52] In so doing, it recognized that entire categories of cases can properly receive uniform disposition "without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided."[53] This approach, in conjunction with other elements of Reporters Committee and traditional Exemption 7(C) principles, subsequently led the D.C. Circuit to largely eliminate the need for case-by-case balancing in favor of "categorical" withholding of individuals' identities in law enforcement records.[54]

In SafeCard, the plaintiff sought information pertaining to an SEC investigation of manipulation of SafeCard stock, including "names and addresses of third parties mentioned in witness interviews, of customers listed in stock transaction records obtained from investment companies, and of persons in correspondence with the SEC."[55] Reiterating the fundamentally inherent privacy interest of individuals mentioned in any way in law enforcement files,[56] the D.C. Circuit found that the plaintiff's asserted public interest--providing the public "with insight into the SEC's conduct with respect to SafeCard"--was "not just less substantial [but] insubstantial."[57] Based upon the Supreme Court's endorsement of categorical rules in Reporters Committee, it then further determined that the identities of individuals who appear in law enforcement files would virtually never be "very probative of an agency's behavior or performance."[58] It observed that such information would serve a "significant" public interest only if "there is compelling evidence that the agency . . . is engaged in illegal activity."[59] Conse-

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[52] 489 U.S. at 776-80.

[53] Id. at 780.

[54] SafeCard, 926 F.2d at 1206.

[55] Id. at 1205.

[56] Id. (recognizing privacy of suspects, witnesses, and investigators).

[57] Id.

[58] Id.

[59] Id. at 1206; see also Quiñon, 86 F.3d at 1231 (finding insufficient public interest in revealing individuals mentioned in FBI files absent evidence of wrongdoing; even if individuals had engaged in wrongdoing, such misconduct would have to shed light on agency's action); McCutchen, 30 F.3d at 188 (The "mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interests protected by Exemption 7(C)."); Beck, 997 F.2d at 1492-94 (no public interest in alleged wrongdoing by two named DEA agents absent any evidence of misconduct or widespread publicity of any investigation); Davis, 968 F.2d at 1282 ("[W]hen . . . governmental misconduct is alleged as the justification for

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quently, the D.C. Circuit held that "unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is [categorically] exempt from disclosure."[60] Nevertheless, agencies should be sure to redact their law enforcement records so that only identifying information is withheld under Exemption 7(C).[61] (See further discussion of privacy redaction under Exemption 6, above.)

Protecting the privacy interests of individuals who are the targets of FOIA

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[59](...continued)
disclosure, the public interest is `insubstantial' unless the requester puts forward `compelling evidence that the agency denying the FOIA request is engaged in illegal activity' and shows that the information sought `is necessary in order to confirm or refute that evidence.'" (quoting SafeCard, 926 F.2d at 1205-06)); Dunkelberger, 906 F.2d at 782 (finding some cognizable public interest in "FBI agent's alleged participation in a scheme to entrap a public official and in the manner in which the agent was disciplined"); cf. Nation Magazine, 71 F.3d at 895-96 (when individual had publicly offered to help agency, disclosure of records concerning that fact might be in public interest by reflecting "agency activity" in how it responded to offers of assistance; court must engage in ad hoc balancing of interests). But see Detroit Free Press, 73 F.3d at 98 (finding, despite no evidence of government wrongdoing, public interest in disclosure of mug shots of indicted individuals who had already appeared in court and had their names divulged); Rosenfeld, 57 F.3d at 811-12 (exceptional finding of public interest in disclosure of names of subjects of investigatory interest because disclosure would serve public interest by shedding light on FBI actions and showing whether and to what extent FBI "abused its law enforcement mandate by overzealously investigating a political protest movement"); Providence Journal, 981 F.2d at 567-69 (exceptional finding of public interest in disclosure of unsubstantiated allegations).

[60] SafeCard, 926 F.2d at 1206; see, e.g., Coleman v. FBI, No. 89-2773, slip op. at 16 (D.D.C. Dec. 10, 1991) (citing SafeCard, 926 F.2d at 1205-06), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992).

[61] See, e.g., Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 230-31 (1st Cir. 1994) (agency's Vaughn index must explain why documents entirely withheld under Exemption 7(C) could not have been released with identifying information redacted); Prows v. United States Dep't of Justice, No. 90-2561, 1996 WL 228463, at *3 (D.D.C. Apr. 25, 1996) (rather than withholding documents in full, agency can simply delete identifying information about third-party individuals to eliminate stigma of being associated with law enforcement investigation); Kitchen v. FBI, No. 93-2382, slip op. at 10-11 (D.D.C. Mar. 18, 1996) (same); accord Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update Summer/Fall 1993, at 4-5 (articulating FOIA policy of "maximum responsible disclosure").

requests and are named in investigatory records requires special procedures. Most agencies with criminal law enforcement responsibilities follow the approach of the FBI, which is generally to respond to FOIA requests for records concerning other individuals by refusing to confirm or deny whether such records exist. Such a response is necessary because, as previously discussed, members of the public may draw adverse inferences from the mere fact that an individual is mentioned in the files of a criminal law enforcement agency.[62] Except when the third-party subject is deceased or provides a written waiver of his privacy rights, law enforcement agencies ordinarily "Glomarize" such third-party requests--refusing either to confirm or deny the existence of responsive records--in order to protect the privacy of those who are in fact the subject of or mentioned in investigatory files.[63]

In employing privacy "Glomarization," however, agencies must be careful to use it only to the extent that it is warranted by the terms of the particular FOIA

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[62] See Ray, 778 F. Supp. at 1215; FOIA Update, Summer 1989, at 5; FOIA Update, Winter 1986, at 3-4 ("OIP Guidance: Privacy `Glomarization'"); FOIA Update, Sept. 1982, at 2; see also Massey, 3 F.3d at 624 ("individuals have substantial privacy interests in information that either confirms or suggests that they have been subject to criminal investigations or proceedings"); Antonelli, 721 F.2d at 617 ("even acknowledging that certain records are kept would jeopardize the privacy interests that the FOIA exemptions are intended to protect"); McNamera, 1997 U.S. Dist. LEXIS 12059, at **33-36 (FBI and INTERPOL may refuse to confirm or deny whether they have criminal investigatory files on private individuals who have "great privacy interest" in not being associated with stigma of criminal investigation); Tanks, 1996 U.S. Dist. LEXIS 7266, at **12-13 (FBI may refuse to confirm or deny existence of any law enforcement records, unrelated to requester's case, concerning informants who testified against requester); Latshaw v. FBI, No. 93-571, slip op. at 1 (W.D. Pa. Feb. 21, 1994) (FBI may refuse to confirm or deny existence of any law enforcement records on third party), aff'd, 40 F.3d 1240 (3d Cir. 1994) (unpublished table decision).

[63] See, e.g., Schwarz, 1995 U.S. App. LEXIS 3987, at *7 ("Glomar" response proper for third-party request for file of requester's "alleged husband" when no public interest shown); Antonelli, 721 F.2d at 617 ("Glomar" response appropriate for third-party requests when requester has identified no public interest in disclosure); McNamera, 1997 U.S. Dist. LEXIS 12059, at **33-36 (finding "Glomar" response concerning possible criminal investigatory files on private individuals proper when no public interest in disclosure); Fiduccia v. United States Dep't of Justice, No. C-92-20319, 1997 U.S. Dist. LEXIS 2684, at **20-22 (N.D. Cal. Feb. 5, 1997) (holding FBI's "Glomar" response "proper and valid" for third-party request) (appeal pending); Early v. Office of Prof'l Responsibility, No. 95-0254, slip op. at 3 (D.D.C. Apr. 30, 1996) ("Glomar" response concerning possible complaints against or investigations of judge and three named federal employees proper when no public interest in disclosure), summary affirmance granted, No. 96-5136, 1997 WL 195523 (D.C. Cir. Mar. 31, 1997); Durham, No. 91-2234, slip op. at 4-5 (D.D.C. Nov. 25, 1992) ("Glomar" response concerning possible subject of murder investigation warranted); see also FOIA Update, Summer 1989, at 5; FOIA Update, Winter 1986, at 3-4.

request at hand.[64] For a request that involves more than just a law enforcement file, the agency must take a "bifurcation" approach to it, distinguishing between the exceptionally sensitive law enforcement part of the request and any part that is not so sensitive as to require "Glomarization."[65] In so doing, agencies apply the following general rules: (1) FOIA requests that merely seek law enforcement records pertaining to a named individual, without any elaboration, can be given a standard "Glomarization" response; (2) any request that is specifically and exclusively directed to an agency's non-law enforcement files (e.g., one aimed at personnel files only) should receive purely conventional treatment, without "Glomarization"; and (3) FOIA requests that do more than simply seek law enforcement records on a named individual (e.g., ones that encompass personnel or possible administrative files as well) must be bifurcated for conventional as well as "Glomarization" treatment.[66]

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[64] See Nation Magazine, 71 F.3d at 894-96 (holding categorical "Glomar" response concerning law enforcement files on individual inappropriate when individual had publicly offered to help agency; records discussing reported offers of assistance to agency by H. Ross Perot "may implicate a less substantial privacy interest than any records associating Perot with criminal activity," so conventional processing required for such records); see also FOIA Update, Spring 1996, at 3-4 ("OIP Guidance: The Bifurcation Requirement for Privacy `Glomarization'").

[65] See, e.g., Nation Magazine, 71 F.3d at 894-96 ("Glomar" response appropriate only as to existence of records associating H. Ross Perot with criminal activity), on remand, 937 F. Supp. 39, 45 (D.D.C. 1996) (agency searched law enforcement files for records concerning Perot's efforts to assist agency and appropriately provided "Glomar" response as to whether Perot was subject, witness, or informant in law enforcement investigation), further proceedings, No. 94-00808, slip op. at 9-11 (D.D.C. Feb. 14, 1997) (ordering agency to file in camera declaration with court explaining whether it ever assigned informant code to named individual and results of any search performed using that code; agency not required to state on record whether individual was ever assigned code number); Tanks, 1996 U.S. Dist. LEXIS 7266, at *4 (upholding privacy "Glomarization" after agency bifurcated between aspects of request); Nation Magazine v. Department of State, No. 92-2303, slip op. at 23-24 (D.D.C. Aug. 18, 1995) (FBI required to search for any "noninvestigative" files on Perot); Grove, 802 F. Supp. at 510-11 (agency conducted search for administrative records sought but "Glomarized" part of request concerning investigatory records); accord Reporters Comm., 489 U.S. at 757 (involving "Glomarization" bifurcation along "public interest" lines); Gardels v. CIA, 510 F. Supp. 977, 979 (D.D.C. 1981), aff'd, 689 F.2d 1100, 1102-03 (D.C. Cir. 1982) ("Glomarization" bifurcation in national security context).

[66] Accord FOIA Update, Spring 1996, at 3-4; see, e.g., Nation Magazine, 937 F. Supp. at 45 (agency searched law enforcement files for less sensitive law enforcement records and appropriately provided "Glomar" response as to whether H. Ross Perot was subject, witness, or informant in law enforcement investigation); Tanks, 1996 U.S. Dist. LEXIS 7266, at *4 (agency bifurcated between

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aspects of request); Grove, 802 F. Supp. at 510-14 (Navy bifurcated between "administrative documents" and those held by its investigative component, Naval Investigative Service).